SUPREME COURT, U. S

FILED

OCT 15 1974

MICHAEL RODAK, JR., CLERK

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

## No. 74-3

MIKE ANDERSON, ET AL.,
*Petitioners,*

VERSUS

PRESTON TRIMBLE, ET AL.,
*Respondents.*

## PETITIONERS' BRIEF ON THE ISSUE OF MOOTNESS

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October, 1974

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**PETITIONERS' BRIEF ON THE ISSUE OF MOOTNESS**

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Counsel has been requested by the Court to file a brief on the possibility of mootness of the issue involved in this case.

The Oklahoma Supreme Court had ruled, in reversing the District Court of Cleveland County, that the Petitioners were not entitled to declaratory and injunctive relief against a statute which makes it a state crime for the Petitioners or anyone else to display the names of war dead on placards during "anti-war, anti-police action, or anti-draft demonstrations." 21 O.S. 1973, §1218.

Although the Court order did not set forth the reasons why the Court was concerned about the possibility of mootness, it is apparent that there might be two reasons for this concern: First, the date, Labor Day 1971, the Petitioners

were going to use the names of Viet Nam war dead to protest the war and draft has passed; second, the United States has withdrawn from active participation in the military conflict in Viet Nam, therefore, there is no reason to protest such participation. Neither one of these considerations, Petitioners believe, is sufficient to justify dismissal of the matter on the ground of mootness.

## PROPOSITION I

### SINCE TITLE 21 O.S. 1973 §1218 AND §1219 REMAIN THE LAW OF THE STATE, AND THE RESPONDENT HAS INDICATED HE WILL ENFORCE ITS PROVISIONS, THE ISSUES HERE ARE REAL AND CONTINUING AND NOT MOOT.

At the threshold, we observe that Title 21 O.S. 1973, §§1218 and 1219, which makes it a crime to carry on placards or otherwise publish for the purpose of any anti-war, anti-police action or anti-draft demonstration or protest on the grounds of schools, colleges, and universities, the names of persons killed in military action without the consent of the surviving spouse, remains in full force and effect today. Petitioners, then, remain subject to prosecution should they exercise their First Amendment rights. This is not a case where the statute whose enforcement is sought to be enjoined has been repealed or declared unconstitutional by the State's highest court as was the case with *Berry* v. *Davis*, 242 U.S. 468, 37 S.Ct. 208, 61 L.Ed. 441.

Two, the decision of the Oklahoma Supreme Court indicates that it did not feel the issue in the case was moot. The decision of Oklahoma's highest court on the merits was rendered on January 8, 1974 (Petition, Appendix, page xi), two and one-half years after the proposed

Labor Day demonstration, and almost one year after the signing of the Paris Accords in which United States military involvement in the war in Southeast Asia was reduced. The petition for rehearing in the Supreme Court of Oklahoma was denied on March 6, 1974 (Petition, Appendix, page xix). There is nothing in either the opinion of the Court or the order denying the petition for rehearing which indicates that the Court was in any way influenced or even considered the question of mootness.

Three, the central fact situation in the case and the legal question involved still remains unanswered by this Court. For this case poses that narrow, but essential fact situation whether a person is entitled under the Constitution to declaratory and injunctive relief against penal enforcement of a criminal statute which on its face is patently and flagrantly unconstitutional in that it proscribes protected First Amendment rights. This case involves a situation where the threat of prosecution is real, not imagined.

## PROPOSITION II

### THE PASSAGE OF TIME AFTER THE DATES OF THE DEMONSTRATION HAS NOT MOOTED THE ISSUES.

Petitioners initially sought to carry on their peaceful demonstration on Labor Day 1971, on the campus of the University of Oklahoma at Norman. The fact that that day has passed does not moot the issues in this case. *Women's Strike for Peace* v. *Hickle*, 420 F.2d 597, 137 U.S. App. D.C. 29, Appeal after Remand, 472 F.2d 1273. In that case the United States Court of Appeals for the District of Columbia Circuit held that the fact the case was still in litigation after the date on which the Plaintiff organization intended to

hold a public demonstration did not moot their lawsuit when there was a likelihood that a demonstration could be rescheduled. Courts have previously noted that where the controversy involves essentially recurring issues of public interest, it is not mooted merely because the most recent particular occasion for consideration of the issue has come and gone. *Walter Holm Company* v. *Harden*, 449 F.2d 1009; *Friend* v. *United States*, 128 U.S. App. D.C. 323 at 325, 388 F.2d 579 at 581 (C.A. D.C. 1907); *Southern Pacific Terminal Company* v. *ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); *Gay Union Corp.* v. *Wallen*, 71 App. D.C. 382, 112 F.2d 192, *cert. den.* 310 U.S. 647, 60 S.Ct. 1098, 84 L.Ed. 1414 (1940); *Boise City Irr. and Land Company* v. *Clark*, 131 Fed. 415 at 419 (Ninth Circuit 1904).

## PROPOSITION III

### THIS CASE HAS NONE OF THE TRADITIONAL BENCHMARKS THAT THIS COURT HAS USED IN DETERMINING THE ISSUE OF MOOTNESS.

As is well known, this Court will hear only actual cases or controversies. Traditionally, various standards have been developed to resolve the issue of mootness if it arises in a case this Court is considering. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, by Richard F. Wolfson and Phillip B. Kurland, Sec. 270 through 285. Four concerns that this Court has addressed itself to in resolving the question of mootness are: that some sort of judicial decree be possible, that the parties remain in a posture sufficiently adverse to insure effective litigation, that the issue in contention continue to be concrete, and that the issue not be one that will recur and yet

be unreviewable. *Super Tire Engineering Company* v. *McCorkle*, 469 F.2d 911 (C.A. N.J. 1972).

a. *Some Sort of Judicial Decree Be Possible.* The entry of judgment or a decree in this case is clearly possible. There has been no compromise or settlement; there has been no release of the right to review; there has been no surrender of the subject matter in the suit or conveyance thereof to third persons; there has been no disillusionment of a corporate party; there has been no amendment or repeal of the statute, and there has been no death of a named party.

b. *That the Parties Remain in a Posture Sufficiently Adverse to Insure Effective Litigation.* A reading of the transcript of evidence in the trial court will show that the parties are more than sufficiently adverse and antagonistic to each other legally to insure that this is a genuine case or controversy. Indeed, part of the answer filed by the respondents was stricken because of the personal allegations made against the Plaintiffs. The contest below was spirited, heated, and well argued. The respondent in his answer clearly admitted that he would enforce the law and that he would file a criminal prosecution against the Plaintiffs in the event their activities violated 21 O.S. 1973, §§1218 and 1219. This determination was reasserted at the hearing on the merits. The threat of prosecution for First Amendment activities is genuine. This same respondent on June 4, 1970, filed a criminal case, CRF 70-201 against Keith B. Green alleging violation of the felony statute which makes it a crime to carry a "red flag" in Oklahoma. Keith Green had been arrested following display of a Viet Cong flag at an ROTC

demonstration on the University of Oklahoma campus. Notwithstanding the fact that this Court had declared similar statutes unconstitutional nearly forty years before, *Stromberg* v. *California*, 283 U.S. 359, 51 S.Ct. 532, 73 A.L.R. 1484, 75 L.Ed. 117 (1931), prosecution was commenced, the defendant Green bound over, and the case was dismissed on September 4, 1970, on defendant's motion to quash, by the District Judge. Thus, the possibility of prosecution of the Plaintiffs by respondent for exercising their First Amendment rights is genuine.

c. *That the Issue in Contention Continue to Be Concrete.* The issue in this case certainly continues to remain concrete and of public concern and it is recurring in nature. That issue is whether a defendant, a party in Oklahoma, may be prosecuted under a patently, unconstitutional penal statute for exercising his First Amendment rights. Also involved is the question of whether the party may seek declaratory and injunctive relief in State Court to enjoin prosecution of such an obviously, flagrantly unconstitutional statute. The issue is likely to arise again in several contexts. First, the Plaintiffs could protest increased involvement by the United States in the Viet Nam conflict or for that matter in any other conflict. Two, the Plaintiffs or others might seek to protest certain police action by carrying on placards the names of war dead. Third, should the draft be reinstated (50 App. U.S.C. 460(h)), the protesting of such reinstatement by carrying the names of those who have been conscripted into military service and then killed in the line of duty would be an entirely appropriate demonstration. The possibility of future litigation is great, not minimal.

d. *That the Issue Be One That Will Recur and Yet Be Unreviewable.* Under the circumstances set forth above, it is clear that this is not a situation where the issue will recur and not be reviewable.

Therefore, using the traditional benchmarks of this Court, it is clear that the issue here is not moot and the Petition should be granted and the decision of the Oklahoma Supreme Court reversed.

Respectfully submitted,

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*Counsel for Petitioners*

October, 1974

**CERTIFICATE OF MAILING**

This is to certify that three copies of the above and foregoing Petition were mailed by United States mail, postage prepaid, to Mr. Larry Derryberry, Attorney General, State Capitol, Oklahoma City, Oklahoma 73105; Mr. Preston Trimble, District Attorney, Cleveland County Courthouse, Norman, Oklahoma 73609; and, to Mr. Clyde Watts, 219 Couch Drive, Oklahoma City, Oklahoma 73102, on the ..... day of October, 1974.

.....

Stephen Jones

SUPREME COURT, U. S.

FILE
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## No. 74-3

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*Respondents.*

## SUPPLEMENTAL RESPONSE RE MOOTNESS

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**SUPPLEMENTAL RESPONSE RE MOOTNESS**

**QUESTION PRESENTED**

**1. DOES A JUSTICIABLE CONTROVERSY EXIST TO ALLOW REVIEW BY THE COURT?**

Petitioners contend their constitutional rights were violated in being denied declaratory and injunctive relief by the Oklahoma Supreme Court. In asking the Court to accept certiorari they allege that "significant questions" as to the awarding of declaratory and injunctive relief are raised by this case. As stated by the Court in *Eccles* v. *Peoples Bank of Lakewood Village*, Cal., 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784, *reh. den.* 333 U.S. 877, 68 S.Ct. 900, 92 L.Ed. 1153 (1948):

> "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of

judicial discretion, exercised in the public interest. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 86 L.Ed. 1620, 62 S.Ct. 1173, 18 NCCA NS 687; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 297, 298, 87 L.Ed. 1407, 1410, 1411, 63 S.Ct. 1070; HR Rep No 1264, 73d Cong 2d Sess p 2; Borchard, Declaratory Judgments 2d ed (1941) pp 312-314. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

"The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance. . . ."

The need for equitable relief in this case is found in petitioners' "Amended Petition" filed in August of 1971 in the District Court, Cleveland County, State of Oklahoma, wherein they asked for a declaratory judgment declaring 21 O.S. 1971, §§1218 and 1219 to be unconstitutional and for temporary and permanent injunction enjoining respondents from prosecuting them under said provisions. Their cause of action was based in part on the following assertions made in their "Amended Petition":

"1. That each of the above named plaintiffs is active in legal protests and demonstrations against the policy pursued by the Government of the United States in South East Asia.

"2. That as a part of their protest activities these individuals have in the past lead and participated in various demonstrations *protesting the War in Viet Nam.* That they have furthermore joined together in membership in various organizations two of which are the

Viet Nam Veterans Against the War and the War Resisters League of Oklahoma. That the mailing address and actual place of business for both of these organizations is 1355½ Jenkins, Norman, Cleveland County, Oklahoma.

". . .

"6. That on Labor Day, 1971, each of these plaintiffs and several other individuals, possibly as many as a Hundred (100), will participate in an anti-War demonstration in Cleveland County, State of Oklahoma. That the purpose of said demonstration will be a peaceful assembly to *protest United States activities in Viet Nam* and South East Asia. That as a part of their protest these plaintiffs and other people participating in the demonstration shall carry and display on cards and/or placards and otherwise cause to be published for the purpose of *protesting against the War and against the Draft* on the grounds of the University of Oklahoma at Norman, and the Cleveland County Court House, the names of all or some of the United States soldiers among others, who have been killed as a result of the United States involvement in the Viet Nam War. That the plaintiffs do not intend to seek the written consent of the surviving spouse of such deceased person if he was married at the time of his death or if he was unmarried the written consent of one or both of the parents or for that matter to secure the written consent of any next of kin of anyone killed in the War that was a United States soldier at the time of his death.

"7. That after Labor Day, 1971, if this Court has acted on the plaintiffs prayer for relief, the plaintiffs intend to continue their peaceful demonstrations in Cleveland County, in the State of Oklahoma, on public property to protest the War in Viet Nam and will continue to carry and display on cards and or placards

and otherwise cause to be published for the purpose of *protesting against the War and against the Draft*, the names of all or some of the United States soldiers among others, who have been killed as a result of the United States involvement in Viet Nam War. That the plaintiffs on these subsequent occasions do not intend to seek the written consent of the surviving spouse of such deceased person if he was married at the time of his death, or if he was unmarried the written consent of one or both of the parents or for that matter to secure the written consent of any next of kin of anyone killed in the War that was a United States soldier at the time of his death." (Emphasis added.)

Petitioners' need for a declaration of their rights is based upon their desire to protest the United States' participation in the Vietnam War and against the "draft." Respondents contend that the bases for petitioners' need no longer exist and that no justiciable controversy exists requiring certiorari review. The fact that the United States is no longer participating in the Vietnam War was recognized by the United States Court of Appeals, Third Circuit, in *Rowland* v. *Tarr*, 480 F.2d 545 (1973), wherein the Court stated:

"Count V is non-justiciable because of mootness. Appellants claimed that the Vietnam conflict was an illegal and unconstitutional war contrary to the principles of military, national, and international law. We take judicial notice that as of this date no one subject to the Military Selective Service Act will be called to serve in Vietnam and that American participation in that conflict has been terminated."

Respondents ask this Court to also take judicial notice that United States' participation in the Vietnam War has been terminated.

Title 50 U.S.C.A. App. §467(c) of the Military Selective Service Act provides:

> "Notwithstanding any other provision of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], no person shall be inducted for training and service in the Armed Forces after July 1, 1973, except persons now or hereafter deferred under section 6 of this title [section 456 of this Appendix] after the basis for such deferment ceases to exist."

The effect of this provision is to replace the "draft" with a system of providing manpower for the Armed Forces of the United States on a voluntary basis. Respondents ask this Court to also take judicial notice that the "draft" has ended.

A moot case is one which seeks to obtain a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right, before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy. As falling within that category, it is well established that where, pending an appeal, an event occurs which makes a determination of the question unnecessary, or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed. *Hudspeth* v. *Com.*, 204 Ky. 606, 265 S.W. 18 (1924); *State* v. *Pyle*, 62 Okla. Cr. 411, 71 P.2d 997 (1937). To the same effect is

*State* v. *Pray*, 30 Nev. 206, 94 Pac. 218 (1908); *Mills* v. *Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

In *Mills* v. *Green*, *supra*, a bill in equity was brought to secure a right to vote at an election to be held in August, 1895, of delegates to the constitutional convention of South Carolina. Before appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing the bill, that date had passed; and, before the entry of the appeal in this Court, the convention had assembled, pursuant to the statutes of South Carolina of 1894, by which the convention had been called. In dismissing the appeal the Court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v. *Veazie*, 8 How. 251; *California* v. *San Pablo & Tulare Railroad*, 149 U.S. 308."

Since the United States is no longer involved in the Vietnam War and the "draft" no longer exists, petitioners' cause of action has become moot and no justiciable controversy is presented for the Court to review. As stated by the

Court in *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973):

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 95 L.Ed. 36, 71 S.Ct. 104 (1950); *Golden* v. *Zwickler*, supra; *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403, 30 L.Ed.2d 560, 92 S.Ct. 577 (1972)."

A petition for a declaratory judgment is no exception to the rule that mootness is to be judged at the present moment, not as of the date of the filing of the complaint. *Golden* v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1909).

While petitioners may urge the Court to accept certiorari to determine the constitutionality of the statutes in question and thus foreclose its application to others in other situations or to petitioners themselves in future protests, consitutional judgments on public laws are justified only when compelled by the adjudication of rights in litigation before the Court. Such an argument was answered by the Court in *Barr* v. *Matteo*, 355 U.S. 171, 78 S.Ct. 204, 2 L.Ed.2d 179 (1958), wherein the Court said:

> "The scope of the litigation in the Court of Appeals cannot lessen this Court's duty to confine itself to the proper exercise of its jurisdiction and the appropriate scope of judicial review. Thus, an advisory opinion cannot be extracted from a federal court by agreement of the parties, see *Swift & Co.* v. *Hocking Valley R. Co.*, 243 US 281, 289, 61 L ed 722, 725, 37 S Ct 287, and no matter how much they may favor the settle-

> ment of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court. *United States* v. *CIO*, 335 US 106, 110, 92 L ed 1849, 1855, 18 S Ct 1349. Likewise, 'Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.' *Eccles* v. *Peoples Bank*, 333 US 426, 432, 92 L ed 784, 789, 68 S Ct 641."

Nor does this case present a justification for a conclusion of non-mootness on the basis that it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Carroll* v. *Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). Such a justification would have application in a case like *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), where appellant's suit to declare the Texas criminal abortion statutes unconstitutional was not declared moot on appeal. Even though appellant's pregnant state at the filing of the lawsuit no longer existed on appeal the Court answered the mootness argument in stating:

> "Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a class of justification for a conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review.'"

In *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Court stated it thusly:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g. *Austin* v. *The Alderman*, 7 Wall. 694, 698-699 (1868); *Supervisors* v. *Stanley*, 105 U.S. 305, 311-315 (1881); *Hatch* v. *Reardon*, 204 U.S. 152, 160-161 (1907); *Yazoo & Miss. Valley R.* v. *Jackson Vinegar Co.*, 226 U.S. 217, 219-220 (1912); *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937); *United States* v. *Raines*, 362 U.S. 17 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris*, 401 U.S. 37, 52 (1971). Constitutional judgments, as Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:
>
> > 'So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)."

## CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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October, 1974

**CERTIFICATE OF MAILING**

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record, this ..... day of October, 1974:

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